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No. 573

# In the Supreme Court of the United States

OCTOBER TERM, 1957

NEW YORK MAIL AND NEWSPAPER TRANSPORTATION COMPANY, PETITIONER

*v.*

THE UNITED STATES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Question presented | 2 |
| Statutes involved | 2 |
| Statement | 4 |
| Argument | 9 |
| Conclusion | 16 |
| Appendix | 17 |


## CITATIONS


| | |
|---|---|
| Cases: | |
| *Baltimore and Ohio R. R. Co.* v. *United States*, 261 U. S. 592 | 9 |
| *Interocean Oil Co.* v. *United States*, 270 U. S. 65 | 9 |
| *Schneider* v. *United States*, 19 Ct. Cls. 547 | 9 |
| *United States* v. *Ellicott*, 223 U. S. 524 | 9 |
| *United States* v. *Speed*, 8 Wall. 77 | 15 |
| Statutes: | |
| Act of April 21, 1902, 32 Stat. 107 | 13, 14 |
| R. S. 3709, 41 U. S. C. 5 | 10, 11, 14, 15 |
| 31 Stat. 258 | 13 |
| 39 U. S. C. (1946 ed.) 423 | 2, 4, 9, 13 |
| 39 U. S. C. (1952 ed.) Secs. 423a, 423b, and 423c (Act of December 27, 1950, 64 Stat. 1118) | 3, 6, 11 |
| Miscellaneous: | |
| 33 Cong. Rec. 4669 | 13 |
| 33 Cong. Rec. 4678 | 13 |
| 33 Cong. Rec. 6240, 6246 | 13 |
| 35 Cong. Rec. 3928 | 13–14 |
| 96 Cong. Rec. 13574 | 6 |
| 96 Cong. Rec. 14665 | 12 |
| H. Rept. 1256, 57th Cong., 1st Sess | 13 |
| H. Rept. 3144, 81st Cong., 2d Sess | 6, 12 |
| Sen. Doc. 279, 57th Cong., 1st Sess | 13 |
| Sen. Rept. No. 2560, 81st Cong., 2d Sess | 12 |

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a–46a) is not yet reported. The court's findings of fact and conclusion of law are printed in the Appendix, *infra*, pp. 17–44.

### JURISDICTION

Final judgment in the Court of Claims was entered on July 31, 1957 (Pet. 8a). The petition for a writ of certiorari was filed on October 24, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).[1]

[1] Petitioner's brief cites 28 U. S. C. 1254 (1). We assume this to be an inadvertent error.

## QUESTION PRESENTED

Whether the court below properly ruled (1) that petitioner's contract with the Government for pneumatic tube transportation of United States mail in New York City was invalid because its terms had not been publicly advertised and (2) that petitioner accordingly is not entitled to an award of anticipated profits and other damages under that contract.

## STATUTES INVOLVED

1. 39 U. S. C. (1946 ed.) 423:

*Transmission by pneumatic tubes; contracts; expert commission; report.*

The Postmaster General may enter into contracts not exceeding in the aggregate $1,388,759 for the transmission of mail by pneumatic tubes or other similar devices for a period not exceeding ten years, after public advertisement once a week for a period of six consecutive weeks in not less than five newspapers, one of which shall be published in each city where the service is to be performed. Contracts for this service shall be subject to the provisions of the postal laws and regulations relating to the letting of mail contracts, except as herein otherwise provided, and no advertisement shall issue until after a careful investigation shall have been made as to the needs and practicability of such service and until a favorable report, in writing, shall have been submitted to the Postmaster General by a commission of not less than three expert postal officials, to be named by him; nor shall such advertisement issue until in the judgment of the Postmaster General the needs of the Postal Service are such as to

justify the expenditure involved. Advertisements shall state in general terms only the requirements of the service and in form best calculated to invite competitive bidding.

2. 39 U. S. C. (1952 ed.) 423a–423c. (Act of December 27, 1950, 64 Stat. 1118):

Sec. 423a. *Transmission by pneumatic tubes; term of contracts.*

The Postmaster General may enter into contracts, for terms not exceeding ten years, for the transmission of mail by pneumatic tubes or other mechanical devices.

Sec. 423b. *Same; conditions governing contract letting.*

Contracts for the transmission of mail by pneumatic tubes or other mechanical devices shall be subject to the provisions of laws relating to the letting of mail contracts, except as otherwise provided in sections 423a–423c of this title. Advertisements shall state in general terms only the requirements of the service and shall be in the form best calculated to invite competitive bidding. The Postmaster General may reject any and all bids. No contract shall be awarded except to the lowest responsible bidder tendering full and sufficient guaranties to the satisfaction of the Postmaster General of his ability to perform satisfactory service.

Sec. 423c. *Same; expenditures for New York City.*

In the city of New York, including the Borough of Brooklyn, the annual rate of expenditure for the transmission of mail by pneumatic tubes shall not exceed $15,500 per mile

per annum of double line pneumatic-tube facilities for a period of ten years, after which time the annual rate of expenditures per mile shall not exceed $12,000. This rate shall be inclusive of maintenance expenses but shall be exclusive of all operating expenses.

**STATEMENT**

Petitioner owned the only pneumatic tube system for transportation of the mails in New York City. It brought this suit in the Court of Claims to recover lost profits and other alleged damages on its ten-year contract to carry the mails which was disavowed as invalid by the United States.

The sole business of petitioner, a subsidiary of the Lamson Corporation of Delaware, had been the leasing of its pneumatic tubes to carry the United States mails between twenty-two post offices in New York City. The pneumatic tube system was started in 1897; petitioner became its owner in 1932. (App., *infra*, p. 17.)

The Postmaster General was authorized to contract for the use of pneumatic tube systems by specific statutes which set forth the manner in which such contracts were to be let and the maximum rates he was authorized to pay. Since petitioner was the owner of the only tube system in New York City, it was the sole bidder to supply such service in that area. Its contracts with the United States varied in form and content. (App., *infra*, p. 17.)

Shortly after entering the latest such contract, for the period ending December 31, 1950, the Postmaster General, as required by the statute then in effect (39 U. S. C. (1946 ed.) 423), appointed a committee of

three postal experts to report on the need and practicability of continuing the use of the pneumatic tube system in New York after December 31, 1950. In a report submitted March 10, 1950, this committee recommended that an advertisement should be issued for pneumatic tube service in New York City under a five- or ten-year lease starting January 1, 1951. (App., *infra*, p. 19.)

Pursuant to this recommendation, the Post Office Department published an "Advertisement Inviting Proposals for Furnishing a Tube System on a Lease or Rental Basis for Use in the Transmission of Mails by Pneumatic Tubes or other Similar Devices at New York, New York." Petitioner responded to this advertisement on May 26, 1950, by submitting a proposed contract. (App., *infra*, pp. 21, 24.)

Its proposed contract, however, varied in many material ways from the advertisement. For example, the proposal omitted provisions called for in the advertisement permitting the Postmaster General to cancel the contract in the public interest or for violation of the postal laws; for failure by the contractor to relocate the tube lines and equipment because of remodeling of the terminal stations; and for failure of Congress to appropriate funds for the system. (App., *infra*, p. 25.)

In addition, instead of offering a contract for rental of the system at a fixed rate per annum, as stated in the advertisement, petitioner submitted a formula under which the annual rent would vary directly with its fixed and variable costs. And under petitioner's proposal, the cost of an impending conversion of the

system from D. C. to A. C. current was to be paid by the United States to petitioner with 3 percent interest, instead of being borne by the contractor as called for in the advertisement. (App., *infra*, pp. 25–26.)

On December 7, 1950, pursuant to a request from an Assistant Postmaster General, petitioner submitted an amended proposal containing the same variations as its original proposal, except that the proposed rent now included the cost of converting the system from D. C. to A. C. Under this new formula, the minimum rent per mile of the tube system ($14,111.80) was more than two thousand dollars over the statutory limit of $12,000 per mile. (App., *infra*, pp. 26–27.)

Meanwhile, the Postmaster General, on August 25, 1950, requested Congress to raise the $12,000 limit for New York City to $15,500, and to enact into positive law provisions contained in various appropriation acts which governed contracts for pneumatic tube systems, H. Rep. 3144, 81st Cong., 2d Sess., p. 2. A bill implementing this request was introduced in the Senate on August 28, 1950 (96 Cong. Rec. 13574), and became law on December 27, 1950 (64 Stat. 1118). (App., *infra*, p. 27.)

No new advertisement was issued after the Act of December 27, 1950. Instead, on December 29, 1950, officials of the Post Office Department signed a contract which closely followed petitioner's proposals of May 26 and December 7, 1950, and which, accordingly, varied in many material ways from the advertisement of April 24, 1950. (App., *infra*, p. 28.)

Subsequent to their report of March 10, 1950, recommending continued use of the pneumatic tube

system, the committee of postal experts restudied the matter in the light of expansions in the postal truck service, and reductions in daily deliveries and collections of mail which became effective in 1950. As a result of this restudy, they made supplementary reports in May and June of 1950 recommending that the tube service be discontinued. (App., *infra*, pp. 20–21.) The necessity for using the tubes was examined again in 1953, and during December of that year a test was conducted to determine whether trucks could handle the mail being transported by tube. This experiment demonstrated that, with the addition of only two additional trucks, the tube system could be discontinued at an annual saving to the United States of $772,935.18. (App., *infra*, p. 30.)

On December 29, 1953, the Postmaster General advised petitioner that the Government considered the purported contract of December 29, 1950, to be invalid, and if it were valid, that it was cancelled in the public interest (App., *infra*, p. 30). Petitioner responded on January 7, 1954, that unless the Notice of Cancellation was rescinded by January 22, 1954, it would treat the contract as breached. The notice was not rescinded, and on January 23, 1954, petitioner notified the Post Office Department that it regarded the contract as terminated for breach by the Government. (App., *infra*, p. 31.)

At the time the contract was disavowed by the Government, the undepreciated balance of plaintiff's depreciable assets was $109,494.08 on an original investment of four million dollars in the tube system.

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This balance was written off as worthless on April 30, 1954, and the tube system was dismantled. Petitioner has engaged in no other business since the termination of the contract. (App., *infra*, p. 32.)

On April 15, 1954, petitioner sued the United States in the Court of Claims, claiming damages of two million dollars. In an opinion by Mr. Justice Reed (sitting by designation), the Court of Claims held that the purported contract was a nullity because it did not comply with the advertising requirements of the statutes governing contracts for transmission of mail by pneumatic tubes, inasmuch as the terms of the contract as executed were materially different from the terms of the public advertisement.

The court therefore denied petitioner's claim for lost profits through 1960 (totalling $352,008.88); the excess of its 1953 over 1952 variable costs ($12,285.16); New York City special franchise taxes for 1954–55 ($26,700); and the cost of removing its equipment from Government-owned stations ($25,650).

The court held, however, that petitioner was entitled to be restored to the position it occupied before the purported contract, and awarded it damages as follows (App., *infra*, p. 44):

| | |
|---|---|
| Unreimbursed cost of power conversion equipment | $141,564.47 |
| Cost of new set of carriers | 27,551.52 |
| Payment of December 1953 expenses | 27,960.94 |
| Expenses of January, 1954 | 6,241.69 |
| New York City special franchise taxes for the second half of the 1953–54 tax year | 12,792.18 |
| Total | $216,110.80 |

Judges Littleton and Madden dissented from the denial by the court of anticipated profits and other damages under the contract.

## ARGUMENT

The court below held that the specialized statute governing petitioner's purported contract to rent the Government a pneumatic tube system (64 Stat. 1118) continued the requirement of prior pneumatic tube statutes that contracts for such service be let only after public advertisement (see 39 U. S. C. (1946 ed.) 423, 429). Since the purported contract upon which petitioner brought suit varied materially from the advertisement setting forth the general terms upon which it should have been let, the agreement was held to be invalid and unenforceable against the United States. Nevertheless, petitioner has been awarded $216,110.80 to restore it to its position prior to the disavowal of the contract. This sum is almost twice the undepreciated value of its assets, which were worthless without a contract with the Post Office Department (App., *infra*, p. 32).[1a]

The settled rule that the United States is not bound by contractual or other commitments of an agent which are not within his authority is not challenged by petitioner here. *Interocean Oil Co.* v. *United States*, 270 U. S. 65; *Baltimore and Ohio R. R. Co.* v. *United States*, 261 U. S. 592. Nor does petitioner deny that a Government contract, the terms of which are required to be publicly advertised, would be unauthorized and hence invalid and not binding on the United States if it had been awarded without such prior advertising. *United States* v. *Ellicott*, 223 U. S. 524, 543; *Schneider* v. *United States*, 19 Ct. Cls. 547. Finally, petitioner does not challenge the fact that the

[1a] Petitioner also retains the sums paid it under the contract through December 31, 1953. (Pet. App. 8a.)

terms of the contract upon which its present suit is based were not publicly advertised.

Petitioner nevertheless seeks to upset the invalidation of its contract by the court below by contending that no public advertising was required by the controlling statute with respect to the terms of this particular contract.[2] Thus, the issue here is a narrow one, turning on an interpretation of technical postal statutes governing a unique category of postal service. We submit that the interpretation of the pneumatic tube statute adopted by the Court of Claims was clearly in accord with the intention of Congress that all pneumatic tube contracts be advertised, and, moreover, that the issue is so restricted in scope as to be inappropriate for review by this Court.

1. Petitioner's argument that no public advertising was required is based almost exclusively on two exceptions in the general advertising statute (R. S. 3709, 41 U. S. C. 5). These exceptions make unnecessary public advertising: (1) where public exigencies demand immediate delivery; or (2) where it is certified that there is but one possible bidder. The short and conclusive answer to petitioner's argument is that the general statute and its two exceptions do not

[2] At the time the contract was made, however, the parties understood advertising to be a requirement. The contract of December 29, 1950, recites that petitioner's amended proposal was accepted "after proper advertisement dated April 24, 1950 inviting proposals for the transmission of mails by pneumatic tubes upon a lease or rental basis (Route 507011–A) * * *" (Exhibit A annexed to the petition in the Court of Claims).

apply here. For, as the opinion below points out, the advertising requirement here involved arises from the explicit terms of the pneumatic tube statutes (Pet. App. 5a):

> We think that the variations, previously listed herein, between the invitation, plaintiff's proposals, and the contract actually signed, demonstrate that the April advertisement could not be treated as a compliance with the essential provisions of 39 U. S. C. (1946 ed.) §§ 423 and 429, set out on p. 2, *supra*. Those sections remained the governing law as to advertising of postal requirements. Neither the Act of 1948, 62 Stat. 1163, nor of 1950, 64 Stat. 1118, made any change. After the 1950 Act the statutory requirements for advertisements were the same as before its passage. The 1950 Act, § 2, as theretofore, made the newly authorized contract "subject to the provisions of laws relating to the letting of mail contracts."

Even petitioner recognizes this, as it must. It argues that the Court of Claims' holding "that the pneumatic tube statute, under which petitioner's contract was executed, itself required advertising should be rejected." (Pet. p. 8.) This, of course, is the real issue which petitioner is urging this Court to review. The application of R. S. 3709, the general advertising statute and its exceptions, is never reached because the pneumatic tube statute specifically requires advertising in the circumstances of petitioner's purported contract. This conclusion, apparent from the face of the statute, is fully supported by the legislative history of the Act of December 27, 1950, and of

the prior statutes governing pneumatic tube service which it consolidated.

(a) On August 25, 1950, Postmaster General Donaldson sent to the Congress legislation to clarify and enact into positive law the provisions of the various appropriation acts governing pneumatic tube service. At that time, contracts for pneumatic tube service were in effect in only two cities—New York (with petitioner) and Boston.[3] Sen. Rept. No. 2500, 81st Cong., 2d Sess. p. 2; H. Rept. 3144, 81st Cong., 2d Sess. p. 2.

The bill was reported in the Senate as "designed to clarify and consolidate the provisions of existing law * * *." Sen. Rept. No. 2500, 81st Cong., 2d Sess. In the Senate, the sponsor of the bill confessed "that since it was a very technical subject, about which I knew very little, the only advice to follow would be that of the Postmaster General * * *." 96 Cong. Rec. 14665. There was no debate in the House, although the House report noted that the statutory limit at New York was being raised to finance conversion of existing pneumatic tube equipment from D. C. to A. C. current. H. Rept. 3144, 81st Cong., 2d Sess.

The bill thus passed did no more than to raise the statutory limit for tube service in New York City from $12,000 to $15,500, and to eliminate the $17,000 limit which was in effect elsewhere. Otherwise, the legislation was simply a reenactment of the pneumatic tube provisions contained in prior appropriation acts.

[3] The Post Office Department advises us that inter-Post Office pneumatic tube service has been abandoned at Boston, and is no longer in use anywhere in the postal service.

Section 2 of the Act expressly referred to the advertising requirement.

(b) These advertising provisions had their origin in the Post Office appropriation for 1903 (Act of April 21, 1902, 32 Stat. 107, 114) which authorized the Postmaster General to make contracts for pneumatic tube service "after public advertisement once a week for a period of six consecutive weeks * * *." (39 U. S. C. (1946 ed.) 423.) This careful language was Congress' reaction to disclosures on the floor of the House of irregularities and conflicts of interest in connection with contracts for pneumatic tube service at New York City in the late 90's.[4] 33 Cong. Rec. 4669. The House first refused to appropriate any funds for pneumatic tube service (33 Cong. Rec. 4678), but later concurred with the Senate in appropriating sufficient funds to finance the contracts then in force. 33 Cong. Rec. 6240, 6246. At the same time, funds were appropriated for an impartial investigation of the need for such service. 31 Stat. 258. A committee of citizens, appointed to conduct this investigation, recommended continuance of the service. The Post Office Department then submitted a bill to Congress which it said protected installation of pneumatic tube service from "needless or careless expenditure, and no suspicion of scandal can possibly attach to it." Sen. Doc. 279, 57th Cong., 1st Sess. This bill was reported favorably in the House, H. Rept. 1256, 57th Cong., 1st Sess., and was subsequently incorporated into the postal appropriation bill for 1903. 35

[4] There is no suggestion of impropriety or unfair dealing in connection with petitioner's contract. (Pet. App. 7a.)

Cong. Rec. 3928. Its rigid advertising provisions became a requirement peculiar to the special laws governing contracts by the Post Office Department for pneumatic tube service.

The 1902 Act amounted to a direction by Congress that contracts for pneumatic tube service be written as in a glass bowl. The terms of every proposed contract for pneumatic tube service were to be publicly revealed by advertisement to prevent even a "suspicion of scandal." Petitioner's purported contract was written in disregard of these requirements, and so was properly invalidated.

Petitioner's real argument is not with the Court of Claims' decision but with the wisdom of the policy of Congress which that decision implemented. Petitioner wishes this Court to review its case because it was the only possible bidder for the contract in issue; it contends that an advertising requirement in these circumstances was unnecessary. But Congress was certainly aware that the physical and economic nature of pneumatic tube systems, built solely for transmission of the mails between Post Offices, necessarily limited bids for service over existing systems to their owners. No one else was equipped to bid. Yet it directed, despite this obvious fact, that all pneumatic tube contracts be let by advertising. Unlike R. S. 3709, the pneumatic tube statute recognizes no exceptions. This was the policy

Congress reiterated in Section 2 of the Act under which petitioner's contract was issued.[5]

2. Petitioner, asserting that the court below substituted its judgment as to the existence of a "public exigency" for that of the Postmaster General, urges that the decision below is in conflict with *United States* v. *Speed*, 8 Wall. 77, 83. But this argument is pointless, since the pneumatic tube statute does not recognize a "public exigency" exception. The statute in *Speed*, on the other hand, expressly authorized the officer charged with procuring the supplies involved to dispense with advertising in his discretion if circumstances demanded it.

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[5] To escape the prior advertising requirements of the pneumatic tube statute, petitioner urges that it be read as if it incorporated the exceptions to the General Advertising Statutes, R. S. 3709. In advancing this view, it offers a curious argument. It contends that Congress enacts statutes expressly requiring advertising for specific kinds of contracts even though R. S. 3709 already does this. Under this view, the specific advertising requirements are superfluous legislation. We cannot agree that specific advertising requirements deliberately written into a statute with the background of the pneumatic tube statute are mere surplusage. As petitioner points out, when Congress wishes to eliminate all advertising requirements it says so. Similarly, we submit that when Congress wishes to require advertising under conditions other than those set forth in R. S. 3709, it specifically legislates to this effect. This is precisely what it did in the statute involved here. To the extent that the specific language of the pneumatic tube statute is inconsistent with the general exceptions of R. S. 3709, the pneumatic tube statute prevails.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

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NOVEMBER 1957.

# APPENDIX

## FINDINGS OF FACT

The court, having considered the evidence, the report of Commissioner Marion T. Bennett, and the briefs and argument of counsel, makes findings of fact as follows:

1. Plaintiff, New York Mail and Newspaper Transportation Company, is a corporation chartered by the State of New York and is a subsidiary of Lamson Corporation of Delaware.

2. From 1932 to 1954 plaintiff was the owner of an integrated system for the transportation of the United States mails in New York City. This was its sole business undertaking. The system consisted of dispatching and receiving stations located in 22 post offices (11 leased and 11 Government-owned), in New York City, and underground pneumatic tubes which connected the several post offices. This system was first established about 1897 and has been added to, from time to time, since then. Except for a short interval in 1901 and 1902 and for a four-year interval in 1918–1922, the system has, since its original establishment, been used continuously for the transportation of the United States mails, pursuant to a series of contracts covering varying periods of time between the owners of the system and the United States. The system was not in operation during the periods mentioned because of adverse reports upon it by the Postmaster General and failure of Congress to appropriate funds for its use. Since 1932 all contracts pertaining to the use of the system have been between the plaintiff, as owner of the system, and the defendant. Each of these latter contracts was executed on behalf of the defendant by its then Postmaster General or Acting Postmaster General or an Assistant Postmaster General.

Since 1938 there had been discussions and negotiations between plaintiff and the Post Office Department concerning new contracts. Plaintiff had been the only bidder since 1932 and was the only company in New York which had the facilities which would have enabled it to make a bid.

**3.** The contracts which plaintiff and defendant had prior to 1938 provided that plaintiff would pay all expenses, including the wages and salaries of employees and the cost of electric power for the operation of the pneumatic tube system, while defendant paid for the service rendered at agreed rates per mile of tube. In 1937 and early 1938 plaintiff sought a change in this arrangement, desiring, among other things, that defendant lease the system. The Postmaster General rejected plaintiff's bids as unacceptable in form, not responsive to the advertisement, nor in accordance with the applicable appropriation. A temporary contract was negotiated for the term March 1, 1938, to June 30, 1938, under which defendant leased the system and paid all operating costs exclusive of maintenance and station change expenses. It was also provided that the Postmaster General might annul, cancel or terminate the contract whenever in his opinion public interest required it. This provision was continued in contracts between the parties until June 30, 1948. Defendant's advertisement inviting proposals for the period subsequent to July 1, 1938, was in the alternative. It invited proposals on (1) route 507011, contemplating the furnishing of service to defendant on the basis previously used, and (2) route 507011-A on a lease or rental basis. Under the contract beginning July 1, 1938, and succeeding contracts until December 31, 1950, the defendant operated plaintiff's tube system with its own employees and assumed the electric power costs with plaintiff bearing the expenses of repair, maintenance, plants and carriers. The series of contracts covering the periods, including the new arrangement on which plaintiff was sole bidder, were as follows:

July 1, 1938, to June 30, 1940.
July 1, 1940, to June 30, 1941, extended to June 30, 1942.
July 1, 1942, to June 30, 1947, extended for two 6-months' periods to June 30, 1948.
July 1, 1948, to June 30, 1949, extended to Dec. 31, 1949.
Jan. 1, 1950, to Dec. 31, 1950.

None of the foregoing contracts between plaintiff and defendant had exactly the same terms and conditions as in the applicable invitation for bids.

**4.** The law relating to contracts for the transmission of mail in effect on April 24, 1950, when defendant advertised for proposals for furnishing a pneumatic tube system on a

lease or rental basis, was in part as follows [Title 39 U. S. C. § 423 (1946 Ed. Supp. III)]:

> *Transmission by pneumatic tubes; contracts; expert commission; report.*
>
> The Postmaster General may enter into contracts not exceeding in the aggregate $1,388,759 for the transmission of mail by pneumatic tubes or other similar devices for a period not exceeding ten years, after public advertisement once a week for a period of six consecutive weeks in not less than five newspapers, one of which shall be published in each city where the service is to be performed. Contracts for this service shall be subject to the provisions of the postal laws and regulations relating to the letting of mail contracts, except as herein otherwise provided, and no advertisement shall issue until after a careful investigation shall have been made as to the needs and practicability of such service and until a favorable report, in writing, shall have been submitted to the Postmaster General by a commission of not less than three expert postal officials, to be named by him; nor shall such advertisement issue until in the judgment of the Postmaster General the needs of the Postal Service are such as to justify the expenditure involved. Advertisements shall state in general terms only the requirements of the service and in form best calculated to invite competitive bidding.

The Postmaster General was given the right to reject any and all bids, and no contracts could be awarded except to the lowest responsible bidder tendering full and sufficient guaranties.

**5.** Pursuant to the statute quoted above, the Postmaster General, by order 42425, dated January 25, 1950, appointed a committee of three expert postal officials for the purpose of investigating the need and practicability of continuing beyond December 31, 1950, the use of pneumatic tubes for handling mail in New York and Brooklyn under a new contract.

**6.** On March 10, 1950, the committee submitted a report to the Postmaster General. The report discussed the service being rendered, made comparisons of the speed and cost of transmission by pneumatic tubes with surface transportation in motor vehicles and came to nine conclusions, which in summary were that the pneumatic tube service was a valuable auxiliary transportation medium supplementing the motor vehicle service and should be continued. It was recommended that the service between Brooklyn and New

York City should be discontinued when the lines were removed from Brooklyn Bridge in connection with repairs then under way, but that an advertisement should be issued for pneumatic tube service in New York City for a lease of five or ten years from January 1, 1951, stipulating that the bidder should make any required conversion of equipment from direct to alternating current.

7. At the same time the committee on tube service was making its investigation, a group of Post Office inspectors was making an independent survey of the motor vehicle service of the department in New York City. It had always been necessary to maintain vehicle service roughly paralleling the route of the pneumatic tube system in order to transport mail which was too bulky for tube transmission or which had to be transported during hours each day when the tubes were not in operation. In 1917 motor vehicles were substituted for the horse and wagon for the purposes described. In 1950 the condition of the mail trucks, and truck service generally, was in bad condition and inefficient. Some of the trucks were 1917 models. It had been necessary to supplement the department's vehicles with hired trucks. As a result of the survey, several hundred new trucks were added to the motor fleet and the number of motor vehicle circuits was increased from 26 to 40. The old motor equipment was sold as junk.

8. After approval was given in April 1950 for the increase in truck circuits, the Assistant Postmaster General, on April 21, 1950, directed that further study be given to the desirability of continuing the pneumatic tube system in light of the committee's statement in its March 10 report that new motor vehicle circuits might be able to absorb a large percentage of the mail being transported by the tubes. Plans for such circuits were in formative stages in March and had not been presented for departmental consideration.

In April 1950 the truck circuits were not only increased but a departmental directive was issued ordering reduction in the number of mail and parcel post deliveries, discontinuance of night mail collections from street letter and chute boxes and the closing of service windows of the post offices each day at 6:00 p. m.

**9.** In light of the two developments described in the finding above, the committee submitted a supplemental report on May 15, 1950. This report stated that the revised and reduced postal service would decrease the utility of the tube operation, and the new truck circuits, if supplemented by 15 more trucks, would provide the service which in the March report was estimated as equivalent to the tube service. The supplemental report estimated that the total annual cost of operating the additional trucks would be $510,336.19 as compared with an annual cost of $790,970.82 to maintain the pneumatic tube service, or an annual saving of $280,634.63. In light of these conclusions the report recommended that pneumatic tube service be discontinued "if in conformity with present policy."

**10.** A second supplemental report was made on June 6, 1950, by the tube committee. This report showed that the Post Office Department regularly employed 138 persons to operate the tube system. By various tests the committee concluded that 77 mail handlers could take care of the mail being carried by the tubes for a net saving of 61 employees. Taking into account this saving in personnel, the committee revised its cost analysis of the competing systems and showed that as against an annual cost of $790,970.82 for the operation of the tube system, the additional motor vehicle service to supplant the tubes would cost only $341,568.59, effecting thereby an estimated net annual saving of $449,402.23 instead of the $280,634.63 shown by its May 15 report. The committee renewed its recommendation that the pneumatic tube service be discontinued, pointing out that these findings gave further emphasis to its May 15 recommendations.

**11.** In the meantime, in the light of the recommendation contained in the March 10, 1950, committee report, the Post Office Department had published on April 24, 1950, an "Advertisement Inviting Proposals for Furnishing a Tube System on a Lease or Rental Basis for Use in the Transmission of Mails by Pneumatic Tubes or other Similar Devices at New York, New York." The Acting Assistant Postmaster General sent a memorandum to the Postmaster General on May 18, 1950, attaching the reports of the tube committee dated March 10 and May 15, 1950. This memorandum reviewed the situation and concluded that changed

conditions since the initial report of March 10 now made discontinuance of the tube system desirable in the interests of economical administration. A second memorandum from the Assistant Postmaster General was sent to the Postmaster General on June 7, 1950, setting forth the conclusion reached by the tube committee as described in finding 10. This memorandum raised to $452,909.37 the estimated savings per annum if the tube system would be discontinued when the current contract expired on December 31, 1950.

12. The advertisement of April 24, 1950, above referred to, invited proposals until May 31, 1950, "for furnishing a pneumatic tube system on Route 507011–A, on a lease or rental basis, for use in the transmission of the mails in the Borough of Manhattan in the City of New York, New York, for a period of five years or ten years, beginning January 1, 1951, in accordance with the conditions specified in the instructions to bidders."

Among other things, the instructions to bidders described the mail handling points to be embraced on the tube system and specified what the Post Office Department and the contractor would furnish. It was stated that the contractor would be required to remove the system at his own expense at the expiration of the term or the termination of the contract, if requested to do so by the Postmaster General. Further, that upon discontinuance of the service at any point the contractor would have to restore the premises to the condition in which they were received, ordinary wear and tear excepted, if requested to do so by the Postmaster General.

Paragraph 4 of the advertisement provided that the designated points on the route were to be connected by the shortest practicable route with double lines of pneumatic tubes not less than 8 inches in diameter at the expense of the contractor, notwithstanding the designation and/or location of the stations might be changed during the contract term. Paragraph 6 (d) provided that the contractor should make repairs to the premises connected with the tube system resulting from damage occasioned by the installation of the tubes, power plants, receiving and dispatching apparatus, machinery, equipment and devices.

The cancellation provisions appearing in the instructions to bidders were as follows:

8. The Postmaster General may annul, cancel, terminate and end, any contract that may be entered into under this advertisement—

(a) For repeated failure of the tube system to operate due to matters within the control of the contractor.

(b) For repeated failure on the part of the contractor to make necessary repairs to the tube system promptly.

(c) For failure to have the tube system in a condition for efficient operation on January 1, 1951.

(d) For violation of the postal laws.

(e) For refusal to discharge any persons connected with the maintenance and repair of the tube system when requested to do so by the Postmaster General.

(f) For failure of contractor to change the location of the tube lines, and receiving and dispatching apparatus made necessary by reason of the remodeling or rebuilding of the quarters in which the tube terminals are located; or by reason of the failure of the contractor to have all points embraced on the route as outlined in paragraph 4 of this advertisement, connected with the tube system, as more specifically provided for in said paragraph 4.

(g) For failure of the Congress to appropriate funds for the operation of the system.

(h) Whenever the contractor shall become a member of Congress.

(i) Whenever, in the discretion of the Postmaster General, the public interest may require.

If the Electric Utility Company, which is the supplier of the electricity for the tube system, changes the electricity provided from direct current to alternating current, the contract may be cancelled without further liability on the part of the Government by the Postmaster General unless the contractor at his own expense has adapted the power plants, motors, and equipment of said system for the use of alternating current prior to such change.

The contract shall be cancelled, without additional compensation to the contractor, in the event of the purchase of the pneumatic tube system by the United States.

Annulment, cancellation, termination or ending for any of the causes recited above shall not impair the right of the Postmaster General to claim damages from the contractor or his surety, and such damages may, for the purpose of set-off or counter-claim in the settlement of any claim of said contractor or its surety against the

United States, whether arising under this contract or otherwise, be assessed and liquidated by the General Accounting Office of the United States.

**13.** The plaintiff submitted to the Post Office Department, on May 26, 1950, a form of proposed contract by way of bid, the terms and conditions of which varied in many ways from the advertisement to which it was a response. Plaintiff's covering letter which accompanied the bid bond and proposed contract stated in part:

> As per our custom in the past and as per our telephone notification to you, our proposal is submitted in the form of a contract using as its base the existing contract between the parties with deletions, additions and modifications to meet the new proposed ten year contractual relationship which has been discussed between us. Conditions and requirements in your advertisement not specifically included in our proposal are intended to be excluded from our proposal.

**14.** The lengthy and detailed proposed rental contract submitted by plaintiff on May 26, 1950, offered to provide a tube system of double lines connecting the 22 postal points described in defendant's advertisement. The proposal provided that the contractor would maintain the pneumatic tubes and equipment and appurtenant machinery, including power plants, and that, except as otherwise provided, the labor and power necessary for operation of the tubes and the handling of mails thereby should be furnished by defendant. The contractor was not to be under any obligation to change the location, arrangement, or character of its equipment, including power plants, as the same might exist at the commencement of the lease. It was proposed that the contractor would at his own expense remove the tubes, power plants, and all apparatus from leased Post Office premises at the expiration of the term or at the termination of the contract or at the termination of the lease where no relocation of a station was involved, if requested to do so by the Postmaster General. No express provision relating to repair occasioned by installation or removal of tubes and machinery was included.

**15.** The proposal of May 26, 1950, contained provisions permitting the Postmaster General to annul, cancel or ter-

minate the contract for repeated failure of the tube system to operate, failure of the contractor to make necessary repairs promptly, failure to have it in condition for efficient operation by January 1, 1951, or a reasonable time thereafter, including failure to install equipment when required to convert AC current to DC current, and refusal of the contractor to discharge any person working in connection with the operation of the tube system when requested to do so by the Postmaster General, as well as the standard prohibition clause against a Member of Congress having a contract with the United States. The contract could also be cancelled if the defendant bought the tube system. By reference to the cancellation provisions contained in defendant's advertisement and instructions to bidders set forth in finding 12, it will be seen that plaintiff's proposal of May 26, 1950, omitted the following described provisions set forth in that finding: (d), (f), (g), and (i). With reference to a provision in the advertisement which would have placed upon the contractor the expense of conversion of all equipment from DC to AC, plaintiff's proposal did contemplate the purchase and installation of conversion equipment by plaintiff but contained a clause which required defendant to reimburse it over a 10-year period for the full cost thereof plus three percent interest. Defendant's advertisement also contained a penalty provision which the Postmaster General could invoke against the contractor for unsatisfactory service for causes within the contractor's control. Plaintiff's proposal omitted such a provision.

Plaintiff's proposal also omitted the term of the advertisement by which the General Accounting Office was to be authorized to assess and liquidate defendant's damage claims in the event of claims by the bidder arising from a termination of the contract pursuant to its terms.

**16.** Defendant's advertisement provided that proposals submitted thereunder should specify the rate per annum for the rental of the tube system. Plaintiff's proposal, in response thereto, provided for a computation of the rental to be paid annually for the leased property to permit the plaintiff to realize substantially the sum of $144,000 a year, covering allowance for depreciation, interest and return on investment, in addition to the contractor's costs properly

chargeable against the leased property. No fixed rate per mile for rental was specified. The costs of maintaining the tube system were set out in two schedules entitled *Constant Costs* and *Variable Costs*. Each year's rental was to consist of the $144,000 plus a fixed amount to cover constant costs plus the actual amount of the preceding year's variable costs. Accordingly, the rental was to vary annually as the preceding year's variable costs increased or decreased.

**17.** One paragraph of plaintiff's proposal in response to defendant's advertisement provided in part as follows:

> *Seventh:* It is agreed that it is the intent of the parties hereto that this contract shall not be deemed to be subject to the several acts of Congress relating to Post Offices and Post Roads now existing or hereafter made, or to rules or regulations of the Post Office Department now existing or hereafter made, except as such acts, rules or regulations are specifically applicable to the leasing of the property hereunder by the contractor or to the service to be performed by the contractor hereunder. It is further specifically agreed that this contract is not and shall not be subject to extension or renewal under any act of Congress now existing or hereafter made, or any rule or regulation of the Post Office Department or any other agency of the Government now existing or hereafter made, and that the term of this contract shall expire in any event at midnight December 31, 1960. It is further specifically agreed that this contract is not and shall not be subject to renegotiation or any other adjustment of the terms or amount or method of calculation of payments under any act of Congress now existing or hereafter made or any rule or regulation of the Post Office Department or any other agency of the Government now existing or hereafter made.

**18.** The Assistant Postmaster General wrote to plaintiff's president on November 21, 1950, stating in part:

> * * * inasmuch as the proposal you originally submitted is more or less on the basis of a "cost-plus" contract and this would require additional legislation, * * * prepare for our perusal a tentative contract to include an "escalator" or "Adjustment" clause, and submit it to us.

**19.** Pursuant to the foregoing suggestion, plaintiff, on December 7, 1950, submitted an amended proposal, also in contract form. Substantially, it was the same as the proposal of May 26, 1950, except that a new section entitled *Variable*

*Costs* was attached and paragraph 3 of the May proposal was changed to provide that the defendant should pay plaintiff an annual calendar year rental for the leased property in the sum of $352,912.08 or such other sum as due under the variable costs section of the amended proposal. The sum of $352,912.08 was the amount of $14,111.80 per mile of double lines of tubes for the 25.0083 miles of such tubes in plaintiff's system.

**20.** Representatives of plaintiff and defendant had a conference late in December 1950 in an attempt to reach an agreement on the terms of a contract. Among other things discussed was the matter of whether or not a new contract should include a provision giving the Postmaster General the right to cancel it in the public interest at his discretion. The advertisement and instructions to bidders had contained such a proviso. Plaintiff had left it out of its proposals. Some of plaintiff's recent prior contracts had included it and others had not. Plaintiff felt that such a provision in a contract made it unilateral in the sense that the contractor would be bound for a fixed term and the Government would not be bound. Also, plaintiff was concerned by the fact that, under its proposals, expenses for conversion to permit the use of alternating current required the outlay of considerable sums of money to be paid to it by defendant over a period of years and plaintiff wanted to remove uncertainty about the repayment.

**21.** In 1950 the Consolidated Edison Company of New York, Inc., which had supplied direct current for operation of the tube system, notified the Post Office Department it would discontinue the supply on December 31, 1950, unless it received assurance before that time that arrangements would be made to convert the tube system to the use of alternating current. Such conversion costs were estimated to be from $125,000 to $350,000. Plaintiff insisted that for it to bear this expense it would have to receive a rental in excess of the statutory limit of $12,000 per mile sufficient to amortize the cost of the conversion equipment over the term of the contract. Hence, the figures set forth in finding 19 which are in excess of such statutory limit. Defendant was agreeable to a change in the statute and on December 27, 1950, Public Law 889 (81st Congress, 2nd Session) was approved,

authorizing in New York a maximum annual rate of $15,500 per mile for ten years, after which the maximum was to revert to $12,000 per mile. This law repealed all previous laws in conflict with it and specified some of them. The statute required that contracts for the transmission of mail by pneumatic tubes should be subject to the provisions of laws relating to the letting of mail contracts but said nothing about postal regulations. The statute provided also that advertisements should state in general terms only the requirements of the service and be in a form best calculated to invite competitive bidding. No contract was to be let except to the lowest responsible bidder able to guarantee satisfactory performance.

Congress was aware of the fact that this plaintiff was the owner of the only tube system operating in the city of New York and that the necessity for legislation raising the authorized rate of pay per mile from the then statutory rate of $12,000 was because plaintiff could not absorb the expense of making the conversion to alternating current, pay operating and maintenance expenses and obtain a fair profit on capital outlay at the existing statutory rate of pay.

22. The plaintiff was the only bidder. After the Act of December 27, 1950 was passed, no new advertisement or invitation for bids was issued by the Post Office Department. On December 29, 1950, representatives of the plaintiff and defendant signed a document entitled, "Contract for the Rental of Pneumatic Tubes on Route 507011–A at New York, New York." This document followed closely the proposals made by plaintiff on May 26 and December 7, 1950, in answer to defendant's advertisement of April 24, 1950, and as described in prior findings. The provisions under which the Postmaster General could cancel the contract were as proposed by plaintiff except that plaintiff's proposal as set forth in finding 17 was deleted and the following substituted:

> *Seventh:* This contract shall be subject to all the conditions imposed by any provision of law which is by its terms applicable hereto and to the following sections of the Postal Laws and Regulations of 1948: 97.31–97.33; 97.37–97.43, and 98.8, but the Postmaster General shall have no right without the consent of the contractor

to extend or renew this contract beyond midnight December 31, 1960.

None of the foregoing designated sections in paragraph numbered *Seventh* permits termination in the public interest.

The defendant, however, alleges that Section 97.67 of the *Postal Laws and Regulations*, Edition of 1948, was in force and effect on December 29, 1950. This section which was not mentioned in the document dated December 29, 1950, states in part:

> (b) The Postmaster General may discontinue or curtail the service on any mail route in whole or in part in order to place on the route superior service or whenever the public interest in his judgment shall require such discontinuance or curtailment for any other cause. The contractor shall be allowed as full indemnity one month's extra pay on the amount of service dispensed with and a pro-rata compensation for the amount of service retained and continued.

**23.** The contract of December 29, 1950, approved as to form and legality by the Solicitor for the Post Office Department and signed by the Postmaster General, provided for payment of fixed sums of money by the defendant as an annual calendar year rental for the leased property, plus variable sums depending on whether certain variable costs of plaintiff increased or decreased, with an annual ceiling of $387,628.65. Payments were to be calculated on an annual basis and paid monthly. Further, the contractor, relying upon the document as a binding contract for ten years, committed itself to expend a sum estimated at $350,000 for conversion to alternating current, the sum to be amortized over the ten-year term of the contract and the ultimate cost thereof to be borne by defendant at three percent interest. Provisions of the contract are more fully described in subsequent findings dealing with damages.

**24.** On January 29, 1953, plaintiff and defendant executed a written instrument which amended the one of December 29, 1950, with relation to hours of operation of the tube system and provided that, "All other provisions of the contract of December 29, 1950, shall remain in full force and effect."

**25.** On May 28, 1953, a postal inspector's report was sub-

mitted to the Post Office Department containing findings with respect to the pneumatic tube operation. The report advised that in event of discontinuance of the tube system, and the use of trucks instead, the Department would save annually a minimum of $772,935.18. The Postmaster General decided to institute a pilot test by closing down the tubes and using the motor vehicle service for transportation of all mail. Plaintiff was notified on November 30, 1953, by letter, that the tube service in New York City would be closed for a period of one week, effective December 1, 1953. The available capacity of the existing motor vehicle service was used with the addition of only two trucks at an added cost per day of $61.26. During the test period the mail was handled to the satisfaction of the postal officials. Plaintiff was informed by letter dated December 7, 1953, that the tube service would remain closed until further notice. Plaintiff had no notices other than those here described relative to the shutdown and was not afforded any hearing thereon.

26. On December 29, 1953, defendant sent to plaintiff a letter, signed by the Postmaster General, reading as follows:

> Reference is made to the transportation of mail by the pneumatic tube system operated by you in New York City.
>
> This is to advise you that the Government, in the public interest and for the general welfare, considers the purported contract, dated December 29, 1950, between the Government, on the one hand, and the New York Mail and Newspaper Transportation Company, as a principal, and Lamson Corporation of Delaware and Lamson Corporation, as sureties, on the other hand, to be null and void and of no force and effect. The purported contract if valid is hereby cancelled in the public interest. The Government will make no further use of the tube system and will not make further payments under the purported contract.
>
> You are also advised the Government is in need of the space occupied by the company's power plants, receiving and dispatching apparatus, equipment, and devices on leased and Government-owned premises. These must be removed from Government-owned or Government-leased premises as soon as practicable. Arrangements for necessary access to the various postal facilities for the removal of the articles mentioned should be made with the postmaster at New York.

27. On January 7, 1954, plaintiff sent defendant a letter setting forth plaintiff's position that defendant by its letter of December 29, 1953, had breached the contract of December 29, 1950. The letter advised that if plaintiff had not received notice from defendant by January 22, 1954, rescinding the Postmaster General's action, plaintiff would declare the contract terminated for breach by the defendant and would proceed to seek damages therefor. Plaintiff set forth as its reasons for delaying termination until January 22, 1954, that once plaintiff had released its employees plaintiff would not be able to provide service under the contract promptly if resumption of service was desired by the defendant, and, further, that once plaintiff's property was removed from defendant's premises it would not be able to reestablish the tube system except by the expenditure of much time and money.

28. The defendant took no action to rescind as suggested by plaintiff and on January 23, 1954, plaintiff wrote to defendant declaring the contract of December 29, 1950, terminated for breach by defendant. There is no issue in the case over whether or not plaintiff had fully performed its obligations under the contract, as amended, from December 29, 1950, to its cancellation. At the time of termination and prior thereto, plaintiff was ready, willing and able to perform its obligations under the contract. It is found, further, that the action of the Postmaster General was based on substantial evidence which is not challenged by the pleadings in this case as being fraudulent, arbitrary or capricious.

29. For the months from January 1, 1951, through November 1953, the defendant paid to plaintiff, under the contract of December 29, 1950, the sum of $1,027,753.72. The payments made for 1951 total $352,912.08, the exact amount called for by the contract. Payments for 1952 reflect changes after March of that year, at which time plaintiff made its report to the Post Office Department setting forth its charges for the preceding calendar year as provided for under the variable costs section of the contract. The payments made in 1953 reflect, for the period from July through November, a dispute between the partes concerning the allowance of a certain $7,200 item and the final payment of that item upon the dispute being resolved in favor of the plaintiff.

30. In 1938 the principal amount of plaintiff's indebtedness was nearly $3,000,000 and at the time of the execution of the contract of December 29, 1950, was in excess of $2,000,000. No reduction has been made in the principal amount since February 20, 1950. The annual interest on the debt was $91,655.51 in 1951 and 1953 and $91,906.62 in 1952. Assuming payment of such interest annually the plaintiff would have shown a deficit in each of those three years. Plaintiff had been operating at a loss for many years prior to 1950 and its accumulated deficit in 1950 was $2,921,952.42. This deficit was $2,982,180.91 by 1953. On the date of the termination of the tube service by defendant on December 31, 1953, the undepreciated balance of plaintiff's depreciable assets was $109,494.08 on an original investment in the tube system of approximately $4,000,000. On April 30, 1954, this undepreciated balance was written off as worthless and the operating equipment of the tube system thereafter dismantled. Plaintiff is not now engaged in any business activities and has not been since the discontinuance of its services by defendant.

CLAIMS FOR DAMAGES

Plaintiff is claiming damages for breach of contract by defendant as follows:

(a) The unreimbursed principal of plaintiff's expenditures for power conversion equipment, with interest at three percent per annum.

(b) The cost to plaintiff on the cancellation and termination of contracts and arrangements for the purchase of a set of new carriers for use in the pneumatic tube system in the fall of 1954.

(c) The amount which became due to plaintiff under the terms of the contract for the month of December 1953.

(d) The expenses incurred by plaintiff in January 1954 for wages, salaries and other normal expenses, all being reimbursable costs under the contract.

(e) The anticipated net profit to plaintiff under the contract for the years 1954 through 1960.

(f) The excess of plaintiff's 1953 variable costs under the contract over its 1952 variable costs under the contract.

(g) The amount of the New York City special franchise tax which became due and payable on April 1, 1954.

(h) The amount, if any, of the New York City special franchise tax for the tax year July 1, 1954 to June 30, 1955, which plaintiff becomes legally obligated to pay.

(i) The cost to plaintiff of removal of plaintiff's property from Government-owned post offices in New York City.

UNREIMBURSED COST OF POWER CONVERSION EQUIPMENT

**31.** The contract provided in paragraph 2 (a) under the section headed *Variable Costs*, on page 9, as follows:

> The contractor in reliance upon this contract and the term of the contract is committing itself to expend a sum now estimated at $350,000 to acquire and install equipment to convert alternating current to direct current [sic] for the operation of the tube system. It is understood and agreed that Schedule A shall contain an item which shall represent the annual payment required for even amortization over the 10-year term of this contract of such cost when finally determined with interest at 3% per annum * * *

The contract provided under the section headed *Variable Costs*, on pages 10 and 11, for reimbursement to plaintiff of its costs to acquire and install said equipment to convert the current in event of the termination of the contract by plaintiff under various circumstances.

**32.** During 1951 and 1952, plaintiff expended the sum of $214,870.13 to acquire and install equipment to convert direct current to alternating current for the operation of the tube system, and reported its charges to the Post Office Department, as required by the contract. The charges for this work were fair and reasonable, and following the audit by the Post Office Department of the books and records of the plaintiff for the years 1951 and 1952, defendant accepted said sum of $214,870.13 as the cost of such power conversion equipment for the purpose of calculating the monthly payments to be made by the defendant to the plaintiff under the contract in reimbursement of such cost.

**33.** Defendant, pursuant to the terms of the contract, during the years 1951, 1952 and 1953, reimbursed the plaintiff on account of such expenditures in the sum of $84,301.50,

consisting of $73,305.66 as principal and $10,995.84 as interest. Such reimbursement payments were included in the monthly payments made by the defendant to the plaintiff under the contract. No other payments in connection with said expenditures have been made by defendant to plaintiff.

**34.** The difference between the plaintiff's total expenditures for such equipment, in the sum of $214,870.13, and the amount of $73,305.66 heretofore reimbursed by defendant to plaintiff on account of the principal of such expenditures, which difference is the amount claimed by plaintiff from defendant as the unpaid principal balance of the cost of such conversion equipment, is the sum of $141,564.47.

The contract provided for payment of interest on unpaid balances of the power conversion equipment cost, at the rate of three percent per annum which remained unpaid from December 1, 1953. There is no issue in this case as to the ownership or cost of removal of this equipment.

COST OF SET OF NEW CARRIERS

**35.** The contract provided in paragraph 2 (a) under the section headed *Variable Costs*, on pages 9 and 10, as follows:

> * * * It is further understood and agreed that the contractor in preparation for adequate service under this contract from time to time will contract or arrange for the purchase of sets of new carriers and that such contracting or arrangement must be made at a considerable length of time before the carriers can be delivered and put into use.

The contract provided under the section headed *Variable Costs*, on pages 10 and 11, for reimbursement to plaintiff of its costs concerning new sets of carriers in the event of the termination of the contract under various circumstances.

**36.** During 1953 plaintiff contracted and arranged for the purchase of a set of new carriers for use in the pneumatic tube system in the fall of 1954. At the time the purchase order was placed for this set of new carriers it was expected that such set would be put into use in the tube system in the fall of 1954.

**37.** Plaintiff suspended work on the set of new carriers promptly after defendant notified plaintiff on December 7, 1953, that the pneumatic tubes would continue to be shut

down until further notice. Following the plaintiff's letter to defendant of January 23, 1954, in which plaintiff announced that it was terminating the contract because of breach by the defendant, plaintiff promptly cancelled the contracts for the manufacture of a set of new carriers as to any uncompleted portion thereof.

**38.** The total adjusted cost to plaintiff on such cancellation and termination of its contracts and arrangements for the purchase of such set of new carriers is the sum of $30,290.56.

The major part of these costs to plaintiff were charges by Lamson Corporation, with whom the order for the manufacture of the set of new carriers was placed. Lamson Corporation and plaintiff are affiliated corporations, both being subsidiaries of Lamson Corporation of Delaware. It had been the custom of plaintiff for a period of years to have the carrier shells manufactured by Lamson Corporation. In the termination charges of Lamson Corporation to the plaintiff no profit was included.

**39.** The above termination charges of Lamson Corporation to plaintiff on account of cancellation of the purchase order for the set of new carriers in the amount of $30,290.56 included the sum of $2,739.04 representing inventory of Lamson Corporation in existence prior to the receipt of the purchase order from plaintiff in June 1953. Although the record establishes that $1,233.86 of this pre-existing inventory figure of $2,739.04 would have been expended in the production of the contract for the set of new carriers if that contract had been completed, the record does not show that the inventory represented by that $1,233.86 was either purchased for the contract which was terminated or could not have been used on other work of Lamson Corporation. Accordingly, plaintiff's claim for the new carriers is excessive by the amount of $2,739.04 representing preexisting inventory and that amount should be deducted from the $30,290.56 leaving a net balance of cost totaling $27,551.52 which is reasonable and no part of which has been paid by defendant.

PAYMENT FOR DECEMBER 1953 EXPENSES

**40.** As set forth in the contract, the defendant was obligated to pay plaintiff monthly amounts calculated in accord-

ance with the terms of the contract. The amount which became due to plaintiff for the month of December 1953, excluding any amount representing reimbursement of principal cost of conversion equipment or interest thereon, was the sum of $27,960.94, no part of which has been paid by defendant to plaintiff.

EXPENSES OF JANUARY 1954

41. Following receipt of the letter from the Postmaster General on December 30, 1953, plaintiff maintained itself in a position of readiness to resume service if the defendant desired service resumed. Upon giving its notice of termination to the defendant by its letter of January 23, 1954, plaintiff thereupon released its employees as rapidly as possible. Wages and salaries paid by plaintiff to its employees for services in January 1954 and other normal expenses incurred in January 1954 aggregate the sum of $8,241.69. Such expenses were reimbursable costs under the contract. However, $2,000 included in this item represents the 1953–1954 Special Franchise Tax allocable to January 1954. The assessment for the second half of the fiscal year 1953–1954 is included in finding 47 herein. Accordingly, the expense for January 1954, paid by plaintiff, is $6,241.69.

ANTICIPATED NET PROFITS OF PLAINTIFF FOR 1954–1960

42. Under that part of the contract of December 29, 1950, entitled *Variable Costs*, it is stated in part:

> * * * It is, accordingly, agreed that the compensation to be paid the contractor for its services hereunder, and as rental for the leased property shall be for the calendar year 1951, the sum of $352,912.08 and shall be for each succeeding year the sum of $163,972.31, and in addition to said sum in each succeeding year the amount of the contractor's costs for the preceding calendar year of those items listed on Schedule A, annexed hereto and made a part hereof, but in no event shall the total compensation payable for any calendar year exceed the sum of $387,628.65. * * *

The Schedule A referred to above included various taxes and operating expenses, salaries, pensions, maintenance and repair, patterns, jigs, fixtures and amortization of the cost of power conversion equipment. The sum of $352,912.08

quoted above included an estimated amount to cover the 1951 Schedule A costs. In 1952 the sum of $350,691.69 paid to plaintiff included the exact amount of its Schedule A 1951 costs and the $163,972.31. In 1953 plaintiff received payment in the sum of $324,149.95 at a rate which would reimburse it for its 1952 costs with the qualifications stated in finding 46. Nothing was paid to represent the 12th month of 1953 during which time contract operations were suspended by defendant's notice to plaintiff. Plaintiff's claim for that month is set forth in finding 40.

The ceiling amount set in the contract is the product of the number of miles of the tube system, i. e., 25.0083 times $15,500, the ceiling rate of expenditure for the transmission of mail established by act of December 27, 1950, referred to in finding 21.

**43.** Out of the sum of $163,972.31 provided in the contract as the fixed sum plaintiff was to receive for each year (plus variable costs) the plaintiff was to meet its other expenses of carrying on its business and realize its profits. Plaintiff's theory for computing its net profits is to deduct from $163,972.31 its constant costs each year, actual or estimated, which are not costs such as included in Schedule A to the contract. Plaintiff's claim for the years 1954 thorough 1960 is as follows:

| | |
|---|---|
| For 1954 | $136,301.59 |
| For each of the years 1955–60 | 139,241.59 |
| For the aggregate of these 7 years | 971,751.13 |

**44.** The constant costs which plaintiff would deduct as illustrated above are not defined or referred to in the contract. As used by plaintiff they include, among other things, such general expenses as life and health insurance, supplies, travel, professional services, directors' fees, postage, and, as operating expenses, clerical and stenographic salaries, rent, depreciation of machinery, telephone, and supplies. Plaintiff's claimed actual constant costs for 1949 were $19,972.31. In 1950 they were $25,050.67; 1951, $23,396.83; 1952, $27,984.01; 1953, $27,626.10. The estimate of such costs for 1954 is $27,670.72 and for 1955 and subsequent years to 1960, inclusive, $24,730.72 for each such year.

Interest on indebtedness reported in finding 30 was not

included as a refundable expense under variable costs, nor as a constant cost under contract operations.

45. The plaintiff prepared estimates of its variable costs for the years 1954 to 1959 for classifications of expense similar to those tabulated in Schedule A of its contract. Such costs would have been recovered had the contract run its full course through 1960. If we assume that plaintiff's constant costs, which were chargeable against its constant allowance under the contract for the determination of its contract income, would follow substantially the same ratios of variations as its variable costs, then a fair and reasonable determination of plaintiff's anticipated contract profits for the calendar years 1954 through 1960 is $952,008.88. The following tabulation reflects the basis for this determination:

| Years | Variable costs exclusive of amortization charges | | Constant costs and contract allowances | | Income from contract operations |
|---|---|---|---|---|---|
| | | | Costs | Allowances | |
| (a) Actual results of operations: | | | | | |
| 1951 | $159,247.16 | | $23,396.83 | $163,972.31 | $140,575.48 |
| 1952 | 171,559.30 | | 27,984.01 | 163,972.31 | 135,988.30 |
| 1953 | 183,844.47 | | 27,626.10 | 163,972.31 | 136,346.21 |
| Totals | 514,650.93 | | 79,006.94 | 491,916.93 | 412,909.99 |
| Average | 171,550.31 | 100% | 26,335.65 | 163,972.31 | 137,636.66 |
| (b) Projected operations for succeeding years based upon estimates as follows:(*) | | | | | |
| 1953 | 183,944.47 | 107.17% | 28,223.92 | 163,972.31 | 135,748.39 |
| 1954 | 176,818.60 | 103.07% | 27,144.15 | 163,972.31 | 136,828.16 |
| 1955 | 173,747.10 | 101.28% | 26,672.75 | 163,972.31 | 137,299.56 |
| 1956 | 178,847.10 | 104.25% | 27,454.55 | 163,972.31 | 136,517.76 |
| 1957 | 182,866.10 | 106.60% | 28,073.80 | 163,972.31 | 135,898.51 |
| 1958 | 186,755.10 | 108.86% | 28,668.99 | 163,972.31 | 135,303.32 |
| 1959 | 192,554.10 | 112.24% | 29,559.13 | 163,972.31 | 134,413.18 |
| Totals | 1,275,432.57 | | 195,797.29 | 1,147,806.17 | 952,008.88 |

(*) The recoverable variable costs for 1954 are represented by the actual variable costs for 1953, other amounts are estimates which would be recoverable the succeeding year, none of which would exceed the maximum permissible under the contract.

EXCESS OF 1953 OVER 1952 VARIABLE COSTS

46. In finding 42 it is noted that plaintiff received from defendant under the contract for 1953 the sum of $324,149.95 for eleven months of that year. The contract allowance for December 1953 is reported in finding 40, other than amortization charges in connection with the electrical conversion which is allowed in full for the unamortized portion thereof in finding 34. The payments and the amount re-

ported herein for 1953 were based in part upon the variable expenses incurred by plaintiff for 1952 and represent the recoupment in full for such expense. Plaintiff's variable expenses for 1953, which would have been recouped in full in 1954 were some $12,285.16 in excess of its 1952 variable expense. Plaintiff claims this difference of $12,285.16 as a separate item of recovery.

The contract provided that, except for the first year of operations thereunder, the recoupment of variable expenses for any current year would be recovered in payments during the following year. Thus, the actual expense for variables during the last year of operations under the contract would never be recovered. The variable expenses paid during the first year of operation under this contract (1951) were based upon estimated sums which included an allowance of $40,250 representing an estimated sum for the amortization of the power conversion costs. The actual amortization taken by plaintiff in its 1951 variable costs was only $18,494.60. Thereafter the amortization was at the rate of $22,983.41 annually. The calendar year 1953 was the last year of contract operations. There is therefore no basis for allowing recovery of any of plaintiff's 1953 variable costs. However, plaintiff's 1953 variable costs actually incurred in that year have been included in the estimates projected over the following years for the purpose of determining plaintiff's anticipated profits for those years.

NEW YORK CITY SPECIAL FRANCHISE TAXES

47. Plaintiff is obligated to pay to the city of New York a tax payment due on April 1, 1954, being the second half of the special franchise tax levied on plaintiff's pneumatic tube system for the tax year July 1, 1953, to June 30, 1954. The item "Special Franchise Taxes—Manhattan" is one of the items of variable cost under Schedule A of the contract. This tax bill due and payable on April 1, 1954, was such a special franchise tax. Had the contract continued during its term, such tax payment due on April 1, 1954, in the sum of $12,792.18 would have been included as a variable cost for the year 1954 and plaintiff would have been entitled to be reimbursed therefor under the contract.

48. The State Equalization Board of New York assessed the value for special franchise tax purposes of plaintiff's pneumatic tube system which is the subject of the contract, for the tax year July 1, 1954, to June 30, 1955, in the sum of $712,000. Plaintiff duly protested the assessment in a proceeding before the Supreme Court of the State of New York, Albany County, New York, on May 18, 1955, requesting that such assessed valuation be reduced from $712,000 to zero because of the worthlessness of plaintiff's pneumatic tube system resulting from the termination of the contract. No decision in the case has been announced by the court. The city of New York has levied a special franchise tax based upon the assessed valuation of $712,000 for the tax year July 1, 1954, to June 30, 1955, in the amount of $26,700, payable one-half (or $13,350) on October 1, 1954, and one-half (or $13,350) on April 1, 1955. Plaintiff has not paid any part of this tax. If it is determined by the Supreme Court of the State of New York that for the tax year July 1, 1954, to June 30, 1955, plaintiff's pneumatic tube system had a value for purposes of special franchise tax, plaintiff will be obligated to pay the tax based upon such assessed valuation. Any such tax so payable by plaintiff will be one of the items of variable cost under Schedule A of the contract under the heading "Special Franchise Taxes—Manhattan." Had the contract continued during its term, any special franchise tax payments due on October 1, 1954, and on April 1, 1955, for the tax year July 1, 1954, to June 30, 1955, would have been included as items of variable cost for the years 1954 and 1955, respectively, and plaintiff would have been entitled to be reimbursed therefor under the contract.

REMOVAL OF EQUIPMENT FROM GOVERNMENT-OWNED STATIONS

49. The contract of December 29, 1950, contained the following agreement:

> *Fourth:* That the contractor will at his expense remove the tubes, power plants, receiving and dispatching apparatus, equipment and devices from leased Post Office premises, at the expiration of the term, or, except as otherwise herein provided, at the termination of the contract, or at the termination of the lease of any such leased premises where no relocation of the station is involved, if requested to do so by the Postmaster General.

50. At the time of the cancellation of the contract on December 29, 1953, by defendant, half of the post offices in which plaintiff's dispatching and receiving equipment, power plants and other property used with the pneumatic tube system were located, were in buildings owned by the defendant and the rest were in buildings owned by others and leased by defendant. The defendant insisted that plaintiff remove its equipment from all postal premises both leased and Government-owned. The defendant advised plaintiff that if it did not take the action suggested the Government would dispose of the equipment and credit the proceeds, if any, against the cost of removal.

51. The plaintiff advised defendant by letter on March 17, 1954, that the defendant had no right to require that plaintiff pay for the cost of removal from Government-owned premises or to dispose of plaintiff's equipment. Under protest, however, it advised defendant that arrangements would be made to remove the equipment from both Government-owned and leased post office premises and would include the cost of removal from Government-owned premises as a part of its claim against defendant. That claim, here presented, is for $25,650.

52. Plaintiff sought purchasers and entered into a contract with a salvage company on March 24, 1954, for the purchase of all of plaintiff's equipment in both Government-owned and Government-leased post office premises for the price of $60,000. The contract also provided that the plaintiff should pay to the salvage company the sum of $25,650 as the cost of removal of equipment from Government-owned premises. This was the best offer made to plaintiff and was reasonable. All of the property was removed by August 1954.

53. No action has been taken on plaintiff's claim by Congress, by any department of the United States, or in any judicial proceeding, other than appears in these findings. No person other than the plaintiff is the owner or is interested in this claim. No assignment or transfer of this claim or any part thereof or interest in it has been made.

DEFENDANT'S FIRST COUNTERCLAIM

54. Defendant contends that the contract of December 29, 1950, was made "pursuant to discussions and negotiations,

rather than pursuant to public advertisement as required by law with the result that the public competition in the letting of mail contracts contemplated by law was suppressed and defeated, and said purported contract was executed contrary to law, and is void and of no force and effect." Defendant claims that money paid by defendant during the period from January 1, 1950, to November 30, 1953, was illegally paid under an invalid contract and was greatly in excess of the fair and reasonable value of the services rendered by plaintiff and that defendant is entitled to recover from plaintiff the total amount so paid less such sum as plaintiff might prove to be the fair and reasonable value of such services.

It is found that the year 1950 is not properly in question under the counterclaim because it was prior to the effective date of the contract in dispute. The total sum paid to plaintiff by defendant for 1951, 1952 and 1953 is $1,027,753.72. The reasonable value of plaintiff's services during these three years was not less than the sum paid.

DEFENDANT'S SECOND COUNTERCLAIM

55. Defendant asserts that plaintiff was under obligation to remove its equipment from defendant's premises and to restore and repair damages caused thereto by installation and removal of such equipment. Defendant pleads that the reasonable cost to defendant to repair the buildings properly is approximately $28,600. There was no provision in the contract of December 29, 1950, relating to the repair or restoration of any premises in which plaintiff had installed its tubes and equipment, and the only provisions concerning the obligation of plaintiff to remove its property from post office premises at the termination of a contract related to removal from leased premises, with no mention of Government-owned premises. Some of the contracts between plaintiff and defendant prior to July 1, 1948, included provisions requiring plaintiff, at the request of the Postmaster General, to remove its property at the termination of the contract and to restore the premises to their condition existing before such alterations as were made for installation.

**56.** The tubes forming a part of plaintiff's pneumatic tube system passed through various floors, ceilings, partitions and walls of the post office stations which they connected. Tubes were sometimes suspended from the ceiling by pipe hangers while receiving and dispatching apparatus was secured to the floor. Power units were mounted on concrete foundations imbedded in the basement floors of the post offices or were set into depressions made in the floors for that purpose. Certain steel trap doors, floor plating and concrete foundations, which had no apparent use except in connection with plaintiff's equipment, were not removed. Holes were not repaired in any way except that some were covered by steel plates. Holes were left in floors, partitions and ceilings and fireproofing in various buildings was damaged in removal of hangers used to support the tubes.

**57.** The defendant offered proof that the reasonable cost of repairing leased post office premises would be $39,685. It estimates the cost of reasonable repairs to Government-owned buildings at $1,295. Plaintiff denies liability for these repairs under the contract but offered evidence that their total cost, if allowable to defendant, as a matter of law, should not exceed $16,616. All of the foregoing figures include reasonable allowances for profit and overhead. In addition, defendant's figures include 15 percent for drawings, specifications and supervision which would be required by the defendant but not by a private contractor for this type of job. A reasonable allowance for the repairs in question would be $20,000, if allowable as a matter of law.

**58.** Because of the nature of the equipment and the manner of its installation, it would have been impossible to remove it without some damage to the premises. None of the damages to the premises resulting from the removal of plaintiff's equipment has been shown to be the result of any failure on plaintiff's part to use ordinary care in doing such removal work.

SUMMARY

**59.** The various items of plaintiff's claim for damages and the amount, if any, found to be recoverable on each item, are summarized as follows:

| *Item of claim* | *Amount Recoverable* |
|---|---|
| (a) Unreimbursed cost of power conversion equipment | $141,564.47 |
| (b) Cost of new set of carriers | 27,551.52 |
| (c) Payment for December 1953 expenses | 27,960.94 |
| (d) Expenses of January, 1954 | 6,241.69 |
| (e) Anticipated net profits for 1954–1960 | 0 |
| (f) Excess of 1953 over 1952 variable costs | 0 |
| (g) New York City special franchise taxes for the second half of the 1953–1954 tax year | 12,792.18 |
| (h) New York City special franchise taxes for 1954–1955 tax year | 0 |
| (i) Removal of equipment from Government-owned stations | 0 |
| Total | 216,110.80 |

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover, and it is therefore adjudged and ordered that plaintiff recover of and from the United States two hundred sixteen thousand one hundred ten dollars and eighty cents ($216,110.80).

It is further concluded that the defendant is not entitled to recover on its counterclaims, and the counterclaims are therefore dismissed.